
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

MEMORANDUM

TO: MEMBERS OF THE INTERNATIONAL RELATIONS TASK FORCE AND FEDERAL RELATIONS (FEDERALISM) WORKING GROUP

FROM: KARLA JONES, TASK FORCE DIRECTOR

DATE: October 30, 2013

RE: 35 DAY MAILING—2013 States and Nation Policy Summit

The American Legislative Exchange Council will host its 2013 States and Nation Policy Summit **December 4-6** at the **Grand Hyatt at 1000 H Street, NW in Washington, DC**. The **International Relations Task Force** and **Federal Relations (Federalism) Working Group** will meet from **2:30pm to 5:30pm** on **Thursday, December 5, 2013**. If you have not already registered for the meeting, I urge you to do so soon as early bird rates end on **Wednesday, November 6, 2013**.

Subcommittee Meetings – Wednesday, December 4, 2013

On the morning of **Wednesday, December 4**, the **Federalism Subcommittee** will meet from **8:00am-9:00am** and the **Intellectual Property Subcommittee** will meet from **9:15am-10:15am**. Agendas for both meetings will be distributed in the coming days.

I have enclosed the following items for your review.

- Registration Form for Attendees
- Registration Form for Spouse/Guests
- Annual Meeting Agenda-at-a-Glance
- Task Force Meeting *Tentative* Agenda
- Model Policy
- Background Materials for Model Policy
- Scholarship Policies by Meeting
- ALEC Task Force Operating Procedures
- ALEC Mission Statement

The Task Force meeting will be divided between Federalism and International Relations, and we have new policy to consider in both issue areas. Below is a listing of the initial background materials provided for some of the policy to be considered. The attached is not official ALEC model policy until it passes both the [Task Force] and ALEC's National Board of Directors.

Draft Resolution Affirming the Digital Right to Repair/Draft Consumer Protection through Disclosure of Digital Rights Act/Draft Act Protecting Digital Equipment Owners and Small Businesses in Repairing Digital Electronic Equipment

[MA Legislation Addressing Right to Repair](#)
[Consumer Protection through Disclosure of Digital Rights Statement](#)
[Software Licenses Obstruct Transfer of Products](#)

I hope these materials are helpful to you as you prepare for the meeting, and I encourage you to do your own research on the issues we will discuss in December. We will be sending additional materials to you over the next couple of weeks.

I look forward to seeing all of you next month, and if you have any questions or need anything further, do not hesitate to contact me at 571-482-5017 or by e-mail at kjones@alec.org.

Date & Time	Program
Tuesday, December 3	
9:00am - 5:00pm	Joint Board of Directors Meeting
1:00pm - 6:00pm	Registration
2:00pm - 6:00pm	Exhibitor Set Up
6:00pm - 9:00pm	Board of Directors Receptions and Dinner

Date & Time	Program
Thursday, December 5	
7:00am - 7:00pm	Registration
8:00am - 9:15am	Plenary Breakfast (Speakers TBA)
9:30am - 5:00pm	ALEC Exhibition Hall Open
9:30am - 10:45am	Workshops (Topics TBA)
11:00am - 12:15pm	Workshops (Topics TBA)
12:30pm - 2:15pm	Plenary Lunch (Speakers TBA)
2:30pm - 5:30pm	Justice Performance Project
2:30pm - 5:30pm	Health and Human Services Task Force Meeting
2:30pm - 5:30pm	Tax and Fiscal Policy Task Force Meeting
2:30pm - 5:30pm	International Relations Task Force Meeting
6:00pm - 7:00pm	Reception

Date & Time	Program
Wednesday, December 4	
7:00am - 6:00pm	Registration
7:00am - 9:00am	Exhibitor Set Up
7:30am - 11:30am	Subcommittee Meetings (Check with Task Force Director)
9:00 - 5:00pm	ALEC Exhibition Hall Open
9:00am - 11:00am	State Chairs Meeting
11:30am - 1:15pm	Opening Luncheon (Speaker TBA)
1:30pm - 2:45pm	Workshops (Topics TBA)
3:00pm - 4:15pm	Workshops (Topics TBA)
5:30pm - 6:30pm	Jefferson Reception

Date & Time	Program
Friday, December 6	
7:30am - 3:00pm	Registration
8:00am - 9:15am	Plenary Breakfast (Speakers TBA)
9:30am - 2:00pm	ALEC Exhibition Hall Open
9:30am - 10:45am	Workshops (Topics TBA)
11:00am - 12:15pm	Workshops (Topics TBA)
12:30pm - 2:15pm	Plenary Lunch (Speakers TBA)
2:30pm - 5:30pm	Civil Justice Task Force Meeting
2:30pm - 5:30pm	Commerce, Insurance and Economic Development Task Force Meeting
2:30pm - 5:30pm	Communications and Technology Task Force Meeting
2:30pm - 5:30pm	Education Task Force Meeting
2:30pm - 5:30pm	Energy, Environment, and Agriculture Task Force Meeting
2:00pm - 5:00pm	Exhibitor Load Out
6:00pm - 7:00pm	Reception
7:00pm-11:00pm	State Night (Contact Your State Chair)

**International Relations Task Force Meeting
Federal Relations (Federalism) Working Group**

States and Nation Policy Summit
Grand Hyatt * Washington, DC
Thursday, December 5, 2013
2:30 p.m. – 5:30 p.m.

Public Chair: Representative Tim Moffitt (NC)
Private Chair: Brandie Davis (Philip Morris International)
Task Force Director: Karla Jones

TENTATIVE AGENDA

Welcome

Approval of the Minutes from the Annual Meeting

Federal Relations Working Group (Federalism)

Welcome & Brief Update on the Federalism Subcommittee Meeting

Presentation: The Road to Federalism Begins at the Statehouse – Restore the Balance

“Draft Checks and Balances in Government Amendment”

“Draft Equal State Suffrage Act”

Presentation: A Governing Partnership – States as an Independent Check on the Power of the Federal Government

“Draft Policy on Federalism Education Requirements for Public Attorneys”

Panel Discussion: Washington’s Actions Are Felt in the States

International Relations Task Force

Presentation: Supporting Small Business and Economic Growth through Right to Repair

“Draft Resolution Affirming the Digital Right to Repair”

Dual-referral to Communications and Technology Task Force

“Draft Consumer Protection through Disclosure of Digital Rights Act”

Dual-referral to Communications and Technology Task Force

“Draft Act Protecting Digital Equipment Owners and Small Businesses in Repairing Digital Electronic Equipment”

Dual-referral to Communications and Technology Task Force

Presentation: International Ramifications of the Government Shutdown and Flirtation with Debt Default

“Draft Patent Troll Resolution”

Possible dual-referral to Civil Justice Task Force

“Draft Patent Troll Model Policy”

Possible dual-referral to Civil Justice Task Force

Presentation: Trade Agreement Investor-State Dispute Settlement Mechanisms – Clearing Up the Confusion

“Draft Resolution on Country of Origin Labeling”

“Draft Cybersecurity Statement of Principles”

Dual-referral to Communications and Technology Task Force

1 **Draft Checks and Balances in Government Amendment**

2
3 **Article 1 Title.**

4 This article is known as the "Checks and Balances in Government Amendment."
5

6 **Article 2 Denial of State Personnel and Resources to Unconstitutional Acts.**
7

8 A. The Constitution of the United States is the supreme law of the land to which all
9 government, state and federal, is subject.
10

11 B. To protect the people's freedom and to preserve the checks and balances of the United
12 States Constitution, this state may exercise its sovereign authority to restrict the actions of
13 its personnel and the use of its financial resources to purposes that are consistent with the
14 constitution by doing any of the following:
15

- 16 1. Passing an initiative or referendum pursuant to [specify relevant constitutional
17 provision].
18 2. Passing a bill pursuant to [specify relevant constitutional provision].
19 3. Pursuing any other available legal remedy.
20

21 C. If the people or their representatives exercise their authority pursuant to this section,
22 this state and all political subdivisions of this state are prohibited from using any
23 personnel or financial resources to enforce, administer or cooperate with the designated
24 federal action or program.

1 **Draft Equal State's Enfranchisement Act**

2
3 **Section 101 Title.**

4 This chapter is known as the " State's Enfranchisement Act."
5

6 **Section 102 Nominations by the State Legislature.**
7

8 A. Any qualified elector, who has not been nominated as a candidate by primary election
9 or by party committee, may be nominated as a candidate for the United States Senate
10 pursuant to this section.
11

12 B. A nomination petition stating that the United States Senate is the office to be filled, the
13 name and residence of the candidate and other information required by this section shall
14 be filed with each Presiding Officer of the legislature of the state of _____. The
15 petition shall be filed at the same time as primary nomination papers and petitions are
16 required to be filed.
17

18 C. The nomination petition shall be in substantially the following form:
19

20 "The undersigned, duly elected legislators of the state of _____, do hereby nominate
21 _____, who resides at _____ in the county of _____, as a candidate for
22 the office of United States Senator at the general (or special, as the case may be) election
23 to be held on the _____ day of _____, _____.
24

25 I hereby declare that I have not signed the nomination petitions of any candidate for the
26 office to be voted for at any primary election, and I do hereby select the following
27 designation under which name the said candidate shall be placed on the official ballot:
28 State Legislature Candidate for United States Senate."
29

30 D. The nomination petition shall be signed by at least twenty per cent of the then-sitting
31 members of the legislature of the state of _____.
32

33 E. Within thirty (30) days of the nomination petition being duly filed with each Presiding
34 Officer of the legislature of the state of _____, a committee of the whole in each chamber
35 of the Legislature shall be called to consider each such nomination made and shall
36 promptly and simultaneously vote upon each such candidate nominated for the office of
37 United States Senator. The candidate with the greatest number of votes in favor of his or
38 her candidacy shall be deemed eligible for the office of United States Senator and to have
39 his or name printed on the official ballot for the office of United States Senator at the
40 ensuing general (or special, as the case may be) election.
41

Draft Shell Model Policy on Federalism Education Requirements for Public Attorneys

Just last year, the United States Supreme Court admonished, "The independent power of the States serves as a check on the power of the federal government" and "States are separate and independent sovereigns. Sometimes they have to act like it." *NFIB v. Sebelius*.

Over the past couple of decades, the High Court has reiterated time and again that the sovereignty, jurisdiction, and even supremacy of the States in their constitutional spheres is essential to the balance between State and Federal governing partners. The US Supreme Court has taken many opportunities to remind States that the unprecedented constitutional balance between State and Federal governing partners as original designed is still fundamental to the protection of individual liberty.

Prominent Founder John Dickinson warned "it will be their own faults, if the several states suffer the federal sovereignty to interfere in the things of their respective jurisdictions." And yet, when legislators, executive branch officers, court or municipal officials attempt to exert any check upon oppressive actions by the federal government, they are frequently stifled by well- intentioned public attorneys who seem to have little understanding or appreciation of the rights, laws, authorities, or jurisdiction of the "separate and independent sovereign" State, or subdivision thereof, they are charged to represent.

It is apparent that the centralization to Washington of power over virtually every aspect of Americans daily lives has "rendered powerless the checks of one government on another." (Thomas Jefferson). It is also apparent that Washington is not likely to solve "The Washington Problem." If there is to be an "external check" (Federalist 51) on the balance of federal government, "it must be the States themselves reciting such barriers at the constitutional line as cannot be surmounted." (Thomas Jefferson). For the States to "erect barriers against the encroachments of the national authority" (Alexander Hamilton), they must know and be advised in their rights, powers, authorities, sovereignty, supremacy and jurisdiction.

If the States, as the client, do not require and demand that the attorneys who repress them and their subdivisions have not just a passing familiarity, but an extraordinary comprehension of the fundamental principles of federalism, it indeed will be our own faults for allowing the federal sovereignty to interfere in the things of our respective jurisdictions.

This draft model policy calls for the institution of a continuing legal education program for public attorneys so that they are required to be well versed in the foundational constitutional principle that "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people."

"The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S.Ct. 2546, 2570, 115 L.Ed.2d 640 (1991). *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 2431, 120 L. Ed. 2d 120 (1992).

DRAFT RESOLUTION AFFIRMING THE DIGITAL RIGHT TO REPAIR

1 **WHEREAS**, it is the public policy of the State of [insert state name here] to promote the growth
2 of the state's economy, and
3

4 **WHEREAS**, the economy now includes the sale and repair of millions of digital products every
5 year, and
6

7 **WHEREAS**, sales of consumer electronics alone now generate than \$200 billion in revenues for
8 the global economy, and
9

10 **WHEREAS**, digital products include embedded "programming" on the chip or on the circuit
11 board, and;
12

13 **WHEREAS**, a growing number of digital product manufacturers have taken to claiming that this
14 machine-level code is "intellectual property" under the Copyright Act in order to prevent owners
15 from controlling their purchases, and
16

17 **WHEREAS**, owners are being told that machines cannot be repaired because they contain
18 intellectual property, that machines cannot be modified, and that machines cannot be resold
19 because the intellectual property is not transferrable, and
20

21 **WHEREAS**, consumers are purchasing digital products unaware of these restrictions on their
22 ability to repair and resell their purchases, and
23

24 **WHEREAS**, this practice has already been applied to thousands of different digital products
25 ranging from consumer cell phones, to combine harvesters, to automobiles, to mainframe data
26 center equipment, and to industrial controls, and
27

28 **WHEREAS**, consumers and their preferred repair professionals are increasingly being restricted
29 from accessing diagnostic codes, product manuals, replacement parts, repair tools, and machine-
30 level code critical to performing repairs and maintenance, and

31
32 **WHEREAS**, restricting access to any of the preceding elements makes repair either more
33 difficult, illegal, or impossible;

34
35 **WHEREAS**, preventing modification, repair, and resale of digital products decreases the bottom
36 line of the owner, and

37
38 **WHEREAS**, if the product cannot be repaired, most products with digital electronic parts have
39 only scrap value and become e-waste;

40
41 **WHEREAS**, the key to supporting owner's rights to resell is to use their purchases as they see
42 fit is to affirm that the embedded code that is delivered with the machine belongs to the machine,
43 and

44
45 **WHEREAS**, hardware repair has no impact on licensed products, and

46
47 **WHEREAS**, license terms and conditions are external to the repair of equipment and users will
48 still make their software license support arrangements separately, and

49
50 **THEREFORE, LET IT BE RESOLVED**, the State of [insert state name here] believes that
51 unnecessarily interfering with the right to repair digital products is an affront to the principles of
52 free markets and to private property rights, and

53
54 **FURTHER, LET IT BE RESOLVED**, the State of [insert state name here] calls for increased
55 transparency and clarity on the part of digital products manufacturers in the terms and conditions
56 of use, warranties, and license agreements for their products prior to purchase to assist
57 consumers in making informed purchasing decisions, and

58
59 **FURTHER, LET IT BE RESOLVED**, the State of [insert state name here] calls upon the
60 Congress of the United States to thoroughly investigate the issues concerning the right to repair
61 and to take appropriate action through legislation if necessary.

CONSUMER PROTECTION THROUGH DISCLOSURE OF DIGITAL RIGHTS ACT

An Act Protecting Consumers and Business by requiring pre-purchase disclosure of terms and conditions for digital parts and machines.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1. The General Laws are hereby amended by inserting after (insert applicable statute), the following Chapter (number chapter):

Section (1) As used in this chapter, the following words shall, unless the context clearly contains a different meaning, have the following meanings:

“Consumer”, the buyer of any electronic device or machine, including both individual and corporate buyers.

“Digital Electronic Device”, any part or machine manufactured using digital electronic parts.

“Machine Code”, any embedded or essential operational code provided with the machine or part.

“Original Equipment Manufacturer (“OEM”)”, the manufacturer of the digital part of machine and any of its authorized distribution channels including business partners, distributors, retail and internet sales channels.

“Trade Secret”, or anything within the definition of 18 U.S.C. § 1839(3) Section (2)(a)

Section (2) any OEM offering equipment for sale or use in the State of (Insert State), shall provide written details of how each of the policies set forth in Section 3 will apply to purchases or legal transfers of their products. In all cases, policy disclosures shall be available to any prospective buyer at least one week prior to purchase, or as set forth below:

2.a. OEMs may publically post policies on the OEM controlled website, provided that the policies are available without any login or password requirement on the part of the prospective buyer.

2. b. OEMs may provide downloadable or printed materials at the retail point of purchase, provided such materials are clearly and visibly available to any prospective buyer without the assistance of a login, password, or local representative.

2. c. All such policies must be clearly dated as to effective date. Policy changes must be clearly noted and may be not applied retroactively, without the written consent of the buyer. Should the buyer refuse to agree to a policy change, the policy in force at the time of the purchase shall control.

Section (3) All OEMs shall disclose their official policy to prospective buyers on all of the following points according to the requirements listed in Section 2. The method, process, timeframe and pricing by which a buyer will access the library of support and repair documentation, including schematic diagrams and diagnostic repair codes; order service parts; access or order machine code patches, fixes, and updates; order, access, and use diagnostic software tools, including remote diagnostics and error codes; order repair tools, including software tools.

Section (4) All OEMS shall disclose to any prospective buyer, at least one week prior to the purchase, the breakdown of pricing for hardware elements and software license elements for each product offered for purchase. Hardware elements shall be treated as depreciable tangible assets and be fully transferrable between parties. Software licenses shall be separate and specifically provided at least one week prior to purchase for the evaluation and negotiation of the terms and conditions.

AN ACT PROTECTING DIGITAL EQUIPMENT OWNERS AND SMALL BUSINESSES IN REPAIRING DIGITAL ELECTRONIC EQUIPMENT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after (Insert Applicable Statute) the following chapter:- CHAPTER (Insert Applicable Statute)

Section (1) As used in this chapter, the following words shall, unless the context clearly indicates a different meaning, have the following meanings:

“Original Equipment Manufacturer (“OEM”)”, any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new digital electronic parts of machines to consumers or other end users pursuant to a (Insert Applicable Statutes) and is engaged in the diagnosis, service, maintenance or repair of digital electronic equipment to said parts or machines.

“Embedded Software”, any programmable instructions provided on firmware with the machine or part delivered with the machine or part for the purposes of machine operation, including all relevant patches and fixes made by the manufacturer for this purpose, including, but not limited to synonyms “basic internal operating system”, “internal operating system”, “machine code”, “assembly code”, “root code”, “microcode.”

“Authorized Repair Provider”, an oral or written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a separate business organization or individual, as defined in (Insert Applicable Statute) license to use a trade name, service mark or related characteristic for the purposes of offering repair services under the name of the manufacturer. .

“Fair and Reasonable Terms”. In determining whether a price is on “fair and reasonable terms,” consideration may be given to relevant factors, including, but not limited to, the following:

- (i) The net cost to the authorized repair organizations for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.
- (ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the product. Amortized capital costs for the preparation and distribution of the information may be included.
- (iii) The price charged by other manufacturers for similar information.
- (iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.
- (v) The ability of aftermarket technicians or shops to afford the information.

(vi) The means by which the information is distributed.

(vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.

(viii) Inflation.

“Data Security Feature”, any feature of an electronic device designed for the sole purpose of preventing the use of an electronic device in which it is installed from starting without the correct activation or authorization code.

“Documentation”, any manuals, diagrams, reporting output, or service code descriptions provided to the authorized repair provider for the purposes of effecting repair.

“Service Parts”, any replacement parts, either new or used, made available by the manufacturer to the authorized repair provider for the purposes of effecting repair.

“Independent Repair Provider”, a person or business operating in the (Insert State) that is not affiliated with a manufacturer or manufacturer’s authorized dealer of digital electronic equipment, which is engaged in the diagnosis, service, maintenance or repair of digital electronic equipment; provided, however, that, for the purposes of this chapter, a manufacturer shall be considered an independent repair provider for purposes of those instances when said dealer engages in the diagnosis, service, maintenance or repair of digital electronic equipment that are not affiliated with the manufacturer.

“Digital Electronic Equipment”, a part or machine, originally manufactured for distribution and sale in the United States, excepting:

Insert Exclusions

“Owner”, a person or business who owns or leases a digital electronic product purchased or used in the State of (Insert State).

“Remote Diagnostics”, any remote data transfer function between a digital electronic machine and the provider of repair services including for purposes of remote diagnostics, settings controls, or location identification.

“Trade secret”, anything, tangible or intangible or electronically stored or kept, which constitutes, represents, evidences or records intellectual property including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business or management information, or anything within the definition of 18 U.S.C. § 1839(3) Section (2)(a)

Section (2): Except as provided in subsection (2)(e), for Manufacturers of digital electronic parts and machines, sold or used in the State of (Insert State) shall make available for purchase by owners or independent repair facilities of products manufactured by such manufacturer and by the same diagnostic and repair information, including repair technical updates, updates and corrections to firmware, and related documentation in the same manner such manufacturer makes available to its authorized repair channel. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities upon fair and reasonable terms.

(2)(b) Any manufacturer that sells any diagnostic, service, or repair information to any independent repair provider or other third party provider in a format that is standardized with other manufacturers, and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the dealer obtains the same diagnostic, service or repair information, shall be prohibited from requiring any dealer to continue purchasing diagnostic, service, or repair information in a proprietary format, unless such proprietary format includes diagnostic, service, repair or dealership operations information or functionality that is not available in such standardized format.

(2)(c)(i) Each manufacturer of digital electronic products sold or used in the State of (Insert State) shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and remote communications capabilities that such manufacturer makes available to its own repair or engineering staff or any authorized repair channels. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

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~~(2)(c)(ii) Any diagnostic tool or information necessary to diagnose, service or repair a digital electronic part or machine that a manufacturer sells to any independent repair provider in a manner and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the authorized repair provider obtains the same diagnostic tool or information necessary to diagnose, service or repair a digital electronic part of machine, shall also be offered to the authorized repair provider in the same manner and on the same terms and conditions as provided to such independent repair provider. Any manufacturer that sells to any independent repair provider any diagnostic tool necessary to diagnose, service or repair a digital electronic part of machine and such diagnostic tool communicates with the digital electronic part or machine using the same non-proprietary interface used by other manufacturers, the manufacturer delivering such a diagnostic tool shall be prohibited from requiring any authorized repair providers from continuing to purchase that manufacturer's proprietary tool and interface unless such proprietary interface has a capability not available in the non-proprietary interface.~~

Comment [G1]: Delete – part of the auto bill regarding standardized interfaces

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(2)(c)(iii) Each manufacturer that provides diagnostic repair information to aftermarket tool, diagnostics, or third party service information publications and systems shall have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

~~(2)(d)(ii) No manufacturer shall be prohibited from making proprietary tools available to authorized repair providers if such tools are for a specific specialized diagnostic or repair~~

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procedure developed for the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the product was produced, and where original product design was not originally intended for direct interface through the non-proprietary interface set out in (2)(d)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this chapter even if such tools provide functions not available through the interface set forth in (2)(d)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(d)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(d)(i).

(2)(e) Manufacturers of digital electronic equipment or parts sold or used in the State of (Insert State) for the purpose of providing security-related functions may not exclude diagnostic, service and repair information necessary to reset a security-related electronic function from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic module shall be obtained by owners and independent repair facilities through the appropriate secure data release systems.

(2)(f) With the exception of remote diagnostics and repair information that is provided to authorized repair providers necessary to diagnose and repair a customer's digital electronic part or machine, and not otherwise available to an independent repair provider via the tools specified in 2(c)(i) and 2(d)(i) above, nothing in this chapter shall apply to any other remote or information service, diagnostic or otherwise, delivered to or derived from the digital electronic machine by mobile communications; provided, however, that nothing in this chapter shall be construed to abrogate an existing remote diagnostic services or other contract that exists between a manufacturer or service provider, a digital electronic machine, and/or a manufacturer. Nothing in this chapter shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

Comment [G2]: Delete – relates to standardized interface provisions in the Auto Bill

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Section (3) Nothing in this chapter shall be construed to require a manufacturer to divulge a trade secret.

Section (4) Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this chapter shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any provision of (Insert Applicable Statute) or the terms of any authorized repair provider executed and in force between an authorized repair provider and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of a manufacturer pursuant to such authorized repair agreement; provided, however, that any provision in such a authorized repair provider that purports to waive, avoid, restrict or limit a manufacturer's compliance with this chapter shall be void and unenforceable.

Section (5) Nothing in this chapter shall be construed to require manufacturers or authorized repair providers to provide an owner or independent repair provider access to non-diagnostic and

repair information provided by a manufacturer to an authorized repair provider pursuant to the terms of an authorizing agreement.

Section (6)(a) In addition to any other remedies that may be available under law, a violation of this chapter shall be deemed to be an unfair method of competition and an unfair or deceptive act or practice in the conduct of trade or commerce in violation of (Insert Applicable Statute).

Section (6)(b) An independent repair provider or owner who believes that a manufacturer has failed to provide information, including documentation, updates to firmware, safety and security corrections, diagnostics, documentation, or a tool required by this chapter must notify the manufacturer in writing through the (Insert Appropriate Entity) and give the manufacturer thirty (30) days from the time the manufacturer receives the complaint to cure the failure. If the manufacturer cures said complaint within the cure period, damages shall be limited to actual damages in any subsequent (Insert Applicable Statute) litigation.

Section (6)(c) If the manufacturer fails to respond to the notice provided pursuant to (6)(b), or if an independent repair facility or owner is not satisfied with the manufacturer's cure, the independent repair facility or owner may file a complaint in the superior court, or if applicable in the federal district court for the district of (Insert State). Such complaint shall include, but not be limited to the following:

(i) written information confirming that the complainant has attempted to acquire and use, through the then available standard support function provided by the OEM all relevant diagnostics, tools, service parts, documentation, and updates to embedded software, including communication with customer assistance via the manufacturer's then standard process, if made available by such manufacturer;

(ii) written information confirming that the complainant has obtained and utilized the relevant manufacturer's diagnostic tool necessary for such repair; and

(iii) evidence of manufacturer notification as set out in (6)(b).

Section (6)(d) Except in the instance of a dispute arising between an original equipment manufacturer and its authorized repair provider related to either party's compliance with an existing authorized repair agreement, which is required to be resolved pursuant to (Insert Applicable Statute), an authorized repair provider shall have all the rights and remedies provided in this chapter, including, but not limited to, in the instance when exercising rights and remedies as allowed as an independent repair facility under (insert applicable statute).

Draft Shell Resolution on Patent Assertion Entities

Draft Shell Model State Policy on Patent Assertion Entities

Intellectual property protections, such as the patent, have been used to safeguard and incentivize innovation which spurs economic growth. However, patent assertion entities (PAEs), otherwise known as patent trolls, create nothing while posing a serious threat to innovation by consistently engaging in abusive patent litigation. PAEs use patents primarily to obtain unnecessary license fees rather than to support the development or transfer of technology. These aggressive practices stifle innovation, one of the main drivers of US economic growth. Based on ALEC's guiding principle to advance free markets, this resolution will urge the United States Patent and Trademark Office (USPTO) and the U.S. Congress to challenge the status quo by reforming current patent policy in order to facilitate the efficient and prompt resolution of patent infringement claims and protect businesses from abusive and bad faith assertions of patent infringement. A second piece of model policy will give the states a remedy to address the problem.

This serves as a shell resolution for the 35-day mailing. The full text for the resolution will be forthcoming.

Draft Resolution on Country of Origin Labeling

- Whereas,** ~~ALEC, Agriculture Committee is comprised of agricultural leaders of state legislative bodies from across the nation~~ Free markets are one of ALEC's core guiding principles and we have much model policy that supports the enhancement of free markets and international trade; and
- Whereas,** Canada and Mexico are the United States' first and second largest trading partners respectively and that the growth of reciprocal trade should be encouraged as it is beneficial to all three countries; and
- Whereas,** the US mandatory Country of Origin Labeling (COOL) is inconsistent with our World Trade Organization (WTO) obligations and has been found by the WTO to discriminate against imported livestock creating challenges for Canadian and Mexican cattle and hog producers; and
- Whereas,** the US mandatory COOL law jeopardizes the viability of U.S. packing and U.S. feeding infrastructure, placing local and state economies at risk; and
- Whereas,** COOL undermines North American competitiveness in the global market; and
- Whereas,** the Canadian Ministers of Agriculture and International Trade, and their Mexican counterparts, have stated their intention to apply retaliatory tariffs on US exports to Canada and Mexico, our two largest export markets: now therefore be it
- Resolved,** that ALEC encourages the United States Congress to implement a legislative resolution that will build markets for U.S. products at home and overseas rather than implement additional regulations and requirements for our meat producers and processors and be it further
- Resolved,** that this resolution be submitted to the Secretary of the U.S. Department of Agriculture, USTR Ambassador Michael Froman, members of the U.S. House Committee on Agriculture, members of the U.S. Senate Committee on Agriculture, Nutrition and Forestry, the U.S. Secretary of State and other state and federal officials as it is deemed necessary.

Draft Statement of Principles for Cybersecurity

WHEREAS, it is the mission of the American Legislative Exchange Council (ALEC) to advance the principles of free markets, limited government and federalism; and

WHEREAS, effective cybersecurity is essential for the proper function of government and continued growth of the economy in cyberspace; and

WHEREAS, cyber challenges could pose an existential threat to the US economy, our national security apparatus and public health and safety;

THEREFORE, LET IT BE RESOLVED, that ALEC supports the following principles in formulating effective government policy regarding cybersecurity:

1. *Effective cybersecurity measures reflect the global, borderless, and interconnected nature of cyberspace*

Cyberspace is a global and interconnected system of networks and users that spans geographic borders and traverses national jurisdictions. While recognizing government's important role to protect its citizens, the state and the U.S. governments should exercise leadership in encouraging the use of bottom-up, industry-led, and globally-accepted standards, best practices, and assurance programs to promote security and interoperability. We must also collaborate with trusted allies both to share information and to bolster defenses.

2. *Effective cybersecurity measures are capable of responding and rapidly adapting to new technologies, consumer preferences, business models, and emerging threats*

Cyberspace is full of innovation and dynamism, with rapidly changing and evolving technologies. Cybersecurity measures must be equally dynamic and flexible to effectively leverage new technologies and business models, and changing consumer preferences, and address new, ever-changing threats.

3. *Effective cybersecurity measures focus directly on threats and bad actors*

In cyberspace, as in the physical world, adversaries use instruments (in this case, technology and communications) to carry out crime, espionage, or warfare. Cybersecurity measures must enable governments to better use current laws, regulations, efforts, and information sharing practices to respond to cyber bad actors, threats, and incidents domestically and internationally.

4. *Effective cybersecurity measures focus on awareness*

Cyberspace's owners include all who use it: consumers, businesses, governments, and infrastructure owners and operators. Cybersecurity measures must help these stakeholders to be aware of the risks to their assets, property, reputations, operations, and sometimes businesses, and better understand their important role in helping to address these risks. Industry should lead

the way in sharing information with the appropriate government entities following an attack and collaborating with others in the private sector to share best practices.

5. ***Effective cybersecurity measures emphasize risk management***

Cybersecurity is not an end state. Rather, it is a means to achieve and ensure continued trust in various technologies and communications networks that comprise the cyber infrastructure. Cybersecurity measures must facilitate an organization's, whether it is the government or a private entity, ability to properly understand, assess, and take steps to manage ongoing risks in this environment.

6. ***Effective cybersecurity measures build upon public-private partnerships, existing initiatives, and resources***

Partnerships between government and industry has provided leadership, resources, innovation, and stewardship in every aspect of cybersecurity since the origin of the Internet. Cybersecurity efforts are most effective when leveraging and building upon these existing initiatives, investments, and partnerships.

2013 ALEC STATES & NATION POLICY SUMMIT

December 4 – 6, 2013

Grand Hyatt Washington

1000 H Street, NW • Washington, D.C. 20001



ATTENDEE REGISTRATION / HOUSING FORM

Early registration deadline: November 6, 2013

Housing cut-off date: November 6, 2013

■ Online www.alec.org ■ Email meetings@alec.org ☎ Fax 703.373.0932 📞 Phone / Questions 571.482.5056 (Mon-Fri, 9am-5pm EST)

ATTENDEE INFORMATION

Prefix _____ First Name _____ Middle Initial _____ Last Name _____ Suffix(s) : _____
Badge Nickname: _____ Title _____
Organization (required) _____
Preferred Mailing Address: ☐ Business ☐ Home _____
City _____ State/Province _____ Country _____ ZIP/Postal code _____
Preferred Phone ☐ Work ☐ Home ☐ Mobile _____ Alternate phone ☐ Work ☐ Home ☐ Mobile _____ Fax _____
Email (confirmation will be sent by email) _____
On-site Emergency Information Name of Person to Contact: _____ Phone _____ Relationship to You: _____
Do you have any special physical, dietary (for example, vegetarian, kosher), or other needs: ☐ Yes ☐ No
If yes, please describe: _____
☐ This is my first time attending an ALEC event.
***Spouse / Guest:** If registering a spouse or guest, please complete the spouse/guest registration form. Spouse / guest registration is meant to accommodate legal spouses and immediate family members. Attendees from the same organization must register independently.

REGISTRATION INFORMATION

**** Please note that member fees are subject to verification**

	EARLY until Nov6	ON-SITE begin Nov 6	DAILY
<input type="checkbox"/> ALEC Legislative Member	\$375	\$475	\$300
<input type="checkbox"/> Legislator / Non-Member	\$475	\$575	\$400
<input type="checkbox"/> ALEC Private Sector Member	\$650	\$750	\$445
<input type="checkbox"/> Private Sector / Non-Member	\$925	\$1100	\$545
<input type="checkbox"/> ALEC Non-Profit Member (501(c)(3) status required)	\$525	\$625	\$400
<input type="checkbox"/> Non-Profit Non-Member (501(c)(3) status required)	\$675	\$825	\$500
<input type="checkbox"/> Legislative Staff / Government	\$375	\$475	\$300
<input type="checkbox"/> ALEC Alumni	\$425	\$525	\$300
<input type="checkbox"/> ALEC Legacy Member	\$0	\$0	\$0

For Daily Registration, select which day: ☐ Wed ☐ Thur ☐ Fri

REGISTRATION FEES: \$ _____

Note: Registration forms with enclosed payments must be received by November 6, 2013 to be eligible for early bird registration rates. Forms and/or payments received after November 6, 2013 will be subject to the on-site registration rate.

REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm EST November 6, 2013 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm EST November 6, 2013.

HOUSING

RESERVATION CUTOFF FOR ALEC DISCOUNTED RATE IS November 6, 2013

Grand Hyatt Washington Arrival Date _____ Departure Date _____
Sharing with: (Maximum 4 guests per room) _____
Room Type Special requests
☐ Single (1 person – 1 bed) \$289 ☐ ADA room required:
☐ Double (2 persons – 1 bed) \$289 ☐ Audio ☐ Visual ☐ Mobile
☐ Double/ Double (2 persons – 2 beds) \$289 ☐ Rollaway / crib: _____
☐ Triple (3 persons – 2 beds) \$314 ☐ Other: _____
☐ Quad (4 persons – 2 beds) \$314

All rates DO NOT include state and local tax currently 14.5% (subject to change)

Note: Cutoff for reservations at the ALEC rate is November 6, 2013. After November 6, 2013, every effort will be made to accommodate new reservations, based on availability and rate. Room types and special requests are not guaranteed. The hotel will assign specific room types at check in, based upon availability.

HOUSING CONFIRMATION INFORMATION

Online reservations will receive immediate email confirmation. Reservations received by form will be confirmed via email, fax, or mail within 72 hours of receipt.

Credit Card Information/ Reservation Guarantee

Credit Card information is required at time of reservation to guarantee the reservation. Card must be valid through December 2013

☐ Please use the same credit card information as above.
☐ Amer Express ☐ Visa ☐ MasterCard ☐ Discover
Card # _____
Cardholder (please print) _____
Exp Date (mm/yy) _____ Security Code _____
Signature _____

HOUSING CANCELLATION / REFUND INFORMATION

Credit cards will be charged one night room and tax in the event of a no show or if cancellation occurs within 72 hours prior to arrival. Early departure fee is one night's room and tax. Please obtain a cancellation number when your reservation is cancelled.

2013 ALEC STATES & NATION POLICY SUMMIT

December 4 – 6, 2013

Grand Hyatt Washington

1000 H Street, NW • Washington, D.C. 20001



SPOUSE/GUEST REGISTRATION FORM

■ **Online**
www.alec.org

☎ **Fax (credit cards only)**
703.373.0932

📞 **Phone / Questions** • Mon-Fri, 9am-5:00 pm EST
571.482.5056

ATTENDEE INFORMATION IS REQUIRED TO REGISTER A SPOUSE OR GUEST

First Name _____ Last Name _____

Organization _____

Daytime phone _____

Email (Confirmation will be sent by email) _____

SPOUSE / GUEST REGISTRATION

SPOUSE / GUEST REGISTRATION GUIDELINES

1. Spouse / guest registration is meant to accommodate legal spouse and immediate family members.
2. Attendees from the same organization must register independently. No exception will be made.
3. Spouse / guest designation will be clearly visible on name badge.

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

SPOUSE / GUEST REGISTRATION FEES	Number of Spouse/Guest(s)	Fee	TOTAL
<input type="checkbox"/> Spouse / Guest <i>please note name(s) above</i>	_____	\$ 150	\$ _____

METHOD OF SPOUSE / GUEST REGISTRATION PAYMENT

Credit Card: Credit cards will be charged immediately. Please fax to the above number for processing.

☐ Amer Express Card # _____
☐ Visa Cardholder (please print) _____
☐ MasterCard Exp Date (mm/yy) ____/____ Signature _____

REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed within 72 hours of receipt of payment.

REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm EST November 6, 2013 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm EST November 6, 2013.



Mission Statement

To advance free markets, limited government,
and federalism.

AN ACT PROTECTING MOTOR VEHICLES AND SMALL BUSINESSES IN REPAIRING MOTOR VEHICLES

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after chapter 93I the following chapter:-
CHAPTER 93J

Section (1) As used in this chapter, the following words shall, unless the context clearly indicates a different meaning, have the following meanings:

“Dealer”, any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a class 1 license pursuant to the provisions of section 58 and 59 of chapter 140 and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

“Franchise agreement”, an oral or written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

“Fair and Reasonable Terms”. In determining whether a price is on “fair and reasonable terms,” consideration may be given to relevant factors, including, but not limited to, the following:

- (i) The net cost to the manufacturer franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.
- (ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.
- (iii) The price charged by other manufacturers for similar information.
- (iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.
- (v) The ability of aftermarket technicians or shops to afford the information.
- (vi) The means by which the information is distributed.
- (vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.
- (viii) Inflation.

41 "Immobilizer system", an electronic device designed for the sole purpose of preventing the theft
42 of a motor vehicle by preventing the motor vehicle in which it is installed from starting without
43 the correct activation or authorization code.

44 "Independent repair facility", a person or business operating in the commonwealth that is not
45 affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is
46 engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle
47 engines; provided, however, that, for the purposes of this chapter, a dealer, notwithstanding its
48 affiliation with any manufacturer, shall be considered an independent repair facility for purposes
49 of those instances when said dealer engages in the diagnosis, service, maintenance or repair of
50 motor vehicles or motor vehicle engines that are not affiliated with the dealer's franchise
51 manufacturer.

53 "Manufacturer", any person or business engaged in the business of manufacturing or assembling
54 new motor vehicles.

56 "Motor vehicle", a vehicle, originally manufactured for distribution and sale in the United States,
57 driven or drawn by mechanical power and manufactured primarily for use on public streets,
58 roads and highways, but excluding:

- 60 (i) a vehicle that may be operated only on a rail line;
- 61 (ii) a recreational vehicle or auto home equipped for habitation;
- 62 (iii) an ambulance;
- 63 (iv) (iv) a bus, motorcoach or trackless trolley designed for the carriage of persons for
64 hire or for school-related purposes;
- 65 (v) (v) vehicles used exclusively for the building, repair and maintenance of
66 highways or designed primarily for use elsewhere than on the traveled part of
67 ways;
- 68 (vi) (vi) any vehicle with a gross vehicle weight rating of more than 10,000 pounds;
- 69 (vii) (vii) any vehicle excluded from the definition of "motor vehicle" in chapter 90;
70 and
- 71 (viii) (viii) a motorcycle, as defined in section 1 of chapter 90.

73 "Owner", a person or business who owns or leases a motor vehicle registered in the
74 commonwealth.

76 "Trade secret", anything, tangible or intangible or electronically stored or kept, which
77 constitutes, represents, evidences or records intellectual property including secret or
78 confidentially held designs, processes, procedures, formulas, inventions, or improvements, or
79 secret or confidentially held scientific, technical, merchandising, production, financial, business
80 or management information, or anything within the definition of 18 U.S.C. § 1839(3) Section
81 (2)(a)

83 Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and

thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms. (2)(b) Any manufacturer that sells any diagnostic, service, or repair information to any independent repair facility or other third party provider in a format that is standardized with other manufacturers, and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the dealer obtains the same diagnostic, service or repair information, shall be prohibited from requiring any dealer to continue purchasing diagnostic, service, or repair information in a proprietary format, unless such proprietary format includes diagnostic, service, repair or dealership operations information or functionality that is not available in such standardized format.

(2)(c)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

(2)(c)(ii) Any diagnostic tool or information necessary to diagnose, service or repair a motor vehicle that a manufacturer sells to any independent repair facility in a manner and on terms and conditions more favorable than the manner and the terms and conditions pursuant to which the dealer obtains the same diagnostic tool or information necessary to diagnose, service or repair a motor vehicle, shall also be offered to the dealer in the same manner and on the same terms and conditions as provided to such independent repair facility.

Any manufacturer that sells to any independent repair facility any diagnostic tool necessary to diagnose, service or repair a motor vehicle and such diagnostic tool communicates with the vehicle using the same non-proprietary interface used by other manufacturers, the manufacturer delivering such a diagnostic tool shall be prohibited from requiring any dealer from continuing to purchase that manufacturer's proprietary tool and interface unless such proprietary interface has a capability not available in the non-proprietary interface.

(2)(c)(iii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has

appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

(2)(d)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and: (i) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or, (ii) an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or (iii) a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph. Nothing in this Chapter shall be construed to require a dealer to use the non-proprietary vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor shall this Chapter be construed to prohibit a manufacturer from developing a proprietary vehicle diagnostic and reprogramming device, provided that (i) the manufacturer also complies with Section 2(d)(i), and (ii) the manufacturer also makes this device available to independent repair facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

(2)(d)(ii) No manufacturer shall be prohibited from making proprietary tools available to dealers if such tools are for a specific specialized diagnostic or repair procedure developed for the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the vehicle was produced, and where original vehicle design was not originally intended for direct interface through the non-proprietary interface set out in (2)(d)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this chapter even if such tools provide functions not available through the interface set forth in (2)(d)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(d)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(d)(i).

(2)(e) Manufacturers of motor vehicles sold in the commonwealth may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If

excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

(2)(f) With the exception of telematics diagnostic and repair information that is provided to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an independent repair facility via the tools specified in 2(c)(i) and 2(d)(i) above, nothing in this chapter shall apply to telematics services or any other remote or information service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile communications; provided, however, that nothing in this chapter shall be construed to abrogate a telematics services or other contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a dealer. For purposes of this chapter, telematics services include but are not limited to automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points as well as any other service integrating vehicle location technology and wireless communications. Nothing in this chapter shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

Section (3) Nothing in this chapter shall be construed to require a manufacturer to divulge a trade secret.

Section (4) Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this chapter shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any provision of chapter 93B or the terms of any franchise agreement executed and in force between a dealer and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by a dealer on behalf of a manufacturer pursuant to such franchise agreement; provided, however, that any provision in such a franchise agreement that purports to waive, avoid, restrict or limit a manufacturer's compliance with this chapter shall be void and unenforceable.

Section (5) Nothing in this chapter shall be construed to require manufacturers or dealers to provide an owner or independent repair facility access to non-diagnostic and repair information provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise agreement.

Section (6)(a) In addition to any other remedies that may be available under law, a violation of this chapter shall be deemed to be an unfair method of competition and an unfair or deceptive act or practice in the conduct of trade or commerce in violation of section 2 of chapter 93A.

Section (6)(b) An independent repair facility or owner who believes that a manufacturer has failed to provide information or a tool required by this chapter must notify the manufacturer in writing through the National Automotive Service Task Force (NASTF) Service Information Request process or its successor organization or process, and give the manufacturer thirty (30)

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216 days from the time the manufacturer receives the complaint to cure the failure. If the
217 manufacturer cures said complaint within the cure period, damages shall be limited to actual
218 damages in any subsequent 93A litigation.
219

220 Section (6)(c) If the manufacturer fails to respond to the notice provided pursuant to (6)(b), or if
221 an independent repair facility or owner is not satisfied with the manufacturer's cure, the
222 independent repair facility or owner may file a complaint in the superior court, or if applicable in
223 the federal district court for the district of Massachusetts. Such complaint shall include, but not
224 be limited to the following:
225

- 226 (i) written information confirming that the complainant has visited the relevant
227 manufacturer website and attempted to effect a proper repair utilizing information
228 provided on such website, including communication with customer assistance via the
229 manufacturer's toll-free call-in assistance, if made available by such manufacturer;
- 230 (ii) written information confirming that the complainant has obtained and utilized the
231 relevant manufacturer's scan or diagnostic tool necessary for such repair; and
- 232 (iii) evidence of manufacturer notification as set out in (6)(b).
233

234 Section (6)(d) Except in the instance of a dispute arising between a franchisor manufacturer and
235 its franchisee dealer related to either party's compliance with an existing franchise agreement,
236 which is required to be resolved pursuant to chapter 93B, a dealer shall have all the rights and
237 remedies provided in this chapter, including, but not limited to, in the instance when exercising
238 rights and remedies as allowed as an independent repair facility under chapter 93B.

Consumer Protection through Disclosure of Digital Rights

Problem:

Consumers, including business, industry, and government are not consistently provided details of how digital equipment is to be supported prior to point of purchase. Lack of sufficient information creates the situation where the vendor (also known as the Original Equipment Manufacturer or “OEM”) can introduce new requirements post-purchase which interfere with competition for post-purchase repair and limit or prevent asset resale. Lack of resale opportunities destroys the investment made by consumers and forces early retirement of useful assets at the timetable dictated by the OEM.

At the household level, consumers are estimated to already own 25 digitally driven devices, ranging from programmable thermostats to refrigerators to automobiles. The consumer is always at the mercy of the repair policies of the vendor, with no options save those the OEM permits. While repair may not yet be a burning issue for some products, the digital electronics industry trend is strongly towards monopolization of repair and resale with closed markets in agriculture, automobiles, aircraft, industrial controls, medical equipment, point of sale equipment, consumer electronics, cell phones, and “computers”.

Disclosure of the following policies prior to purchase would allow consumers to make educated purchasing decisions, including the opportunity to negotiate more favorable terms and conditions, or to select products that can be more flexible supported and serviced.

The following are the minimum disclosure points that must be included to protect consumers:

- A. What is the price breakdown of hardware elements from licensed elements?
- B. What part of the purchase is transferrable in the secondary market?
- C. How are service parts provided?
- D. How is service documentation provided?
- E. How are updates, patches & fixes, and other defect support provided to machine code?
- F. How are diagnostic routines, including diagnostic tools, provided?

G. How are specialty repair tools provided?

H. How are remote diagnostics, if applicable, provided?

The above list is reflective of areas where OEMs are not consistently divulging their policies, which grants them, by default, the appearance of the right to command a repair and support monopoly for their products. If a vendor does not permit a buyer to access any of the above, it would be the informed choice of the buyer to make the purchase. However, without the ability to service and support equipment outside the OEM, the buyer should not expect to capitalize the asset as there is no ability to transfer the equipment.

DRAFT

SOFTWARE LICENSES OBSTRUCT TRANSFER OF PRODUCTS

More and more everyday products, ranging from high-end servers to toasters, are distributed with pre-installed software critical to their operation. Even though the consumers buy the physical products, the manufacturers often claim that they are just licensing the pre-installed software. These licenses sometimes contain a variety of restrictive terms that interfere with resale of the products, thereby harming the consumers that want to sell equipment they no longer want and the secondary market consumers that want to buy that used equipment. Often, these secondary market consumers are federal, state, and local government entities. **Manufacturers should not be permitted to use software licenses to interfere with the resale of products.**

- **Prohibition on transfer.** Some license agreements provide that the software license is non-transferable. For example, the license for the software that comes installed on a NetApp product is not transferable. As a practical matter, NetApp gets paid twice for the right to use the same software: once by the original purchaser of the product, and a second time by the purchaser of the used product. Cisco charges the purchaser of used equipment so much for a license for the pre-installed software that it is often less expensive for the purchaser to buy new equipment.
- **Refusal to provide updates.** Some license agreements specify that routine updates such as bug-patches will be provided only to the original licensee. For example, Oracle refuses to supply routine updates to the purchasers of used products containing pre-installed Oracle software, unless they make an additional payment.
- **Bundling of maintenance contracts.** Some manufacturers will use control over the pre-installed software as a means of forcing purchasers of used equipment to buy additional services from them. IBM, example, will charge purchasers of used equipment a fee for software updates, but will provide the updates for free to purchasers that enter into maintenance agreements.

The legal fiction on which these restrictive practices is based is that the pre-installed software is licensed, not sold, to the purchaser of the hardware in which the software is installed. The manufacturers argue that because the purchaser is just a licensee of the copy of the software, it does not have rights that normally accrue to the owner of a copy, such as the right of resale or the right to make temporary internal copies necessary for the operation of a computer. *See* 17 U.S.C. §§ 109(a) and 117(a). The U.S. circuit courts are split on the validity of the manufacturers' argument. The Ninth Circuit has accepted it while the Second Circuit has rejected it.

At present, primarily manufacturers of computer and telecommunications equipment misuse software license agreements to interfere with resale. Yet as more products are distributed with pre-installed software, such as cars and consumer appliances, this problem will become more widespread.

The solution to this problem is a simple amendment stating that the statutory rights provided under Title 17 apply to both owners *and licensees* of software, and that these rights cannot be waived by contract.